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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte KAZUHIKO ISOYAMA

Appeal 2009-006066
Application 09/988,653
Technology Center 2400

Before LANCE LEONARD BARRY, HOWARD B. BLANKENSHIP,
and ST. JOHN COURTENAY III, *Administrative Patent Judges*.

COURTENAY III, *Administrative Patent Judge*.

DECISION ON APPEAL¹

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

STATEMENT OF THE CASE

Appellant seeks our review under 35 U.S.C. § 134 of the Examiner's final decision rejecting claims 1-72. We have jurisdiction over the appeal under 35 U.S.C. § 6(b).

We Affirm.

Invention

Appellant's invention relates to a QoS (Quality of Service) server for communications that maintains the quality of service on a network such as an IP (Internet Protocol) network and a control method for allocating resources. More particularly, the invention on appeal relates to a QoS server suitable to have existing communications over the telephone network in a network such as an IP network, and a control method for allocating resources. (Spec. 1).

Claim 1 is illustrative:

1. A QoS server, which is used in a network system comprising:

a network, main signal gateways for accommodating outside networks in the network and executing conversion of main signals between the network and the outside networks, a call setup server for setting up a call, and signaling gateways for executing conversion of signaling signals between the call setup server and the outside networks, including:

a network monitoring section for monitoring the network state, including failures and received signal quality;

a network state database for storing network state information obtained at the network monitoring section;

a resource allocation computing section for computing resource allocation information for applications based on resource requirements with reference to the network state information, including failures and whether traffic of required quality is being received;

a resource allocation database for storing the resource allocation information; and

a network setup section for setting up resource allocation on the network based on an aggregate of calls and the resource allocation information.

The Examiner relies on the following prior art references as evidence of unpatentability:

Hultgren	US 6,134,589	Oct. 17, 2000
Feinberg	US 6,798,745 B1	Sep. 28, 2004
Nag	US 2006/0056298 A1	Mar. 16, 2006

Appellant appeals the following rejection:

Claims 1-72 stand rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Hultgren, Feinberg, and Nag.

ISSUES

Based upon our review of the administrative record, we have determined that the following issues are dispositive in this appeal:

1. Under § 103, did the Examiner err by determining that the combination of references would have taught or suggested setting up resource allocation based on both

an aggregate of call and resource allocation information, within the meaning of representative claim 1? (App. Br. 32, Reply Br. 3).

2. Under § 103, did the Examiner err by improperly combining the references?

GROUPING OF CLAIMS

Based on Appellant's arguments in the Briefs, we decide the appeal on the basis of representative claim 1. *See* 37 C.F.R. § 41.37(c)(1)(vii).

FACTUAL FINDINGS (FF)

We adopt the Examiner's findings in the Answer and final Office Action, with respect to the limitations at issue, as our own. (Ans. 3 *et seq.*). We add the following factual finding:

1. Nag teaches a media aggregation manager 300 having an architecture (Fig. 3) that multiplexes several application flows (e.g., VoIP calls) over a preallocated reservation protocol session, such as a preallocated RSVP (Resource Reservation Protocol). (para. [0053]; *see also* para. [0031]).²

ANALYSIS

Based upon our review of the record, we find unconvincing Appellant's arguments that the Examiner has: (1) erred by determining that

² "RSVP is an Internet Protocol-(IP) based protocol that allows applications running on end-stations, such as desktop computers, to communicate per-flow requirements by signaling the network." (Nag, para. [0007]).

the combination of references would have taught or suggested setting up resource allocation based on both an aggregate of call and resource allocation information (App. Br. 32, Reply Br. 3), and (2), erred in combining the Hultgren, Feinberg, and Nag references under § 103 (App. Br. 32 *et seq.*; *see also* Reply Br. 5 *et seq.*), within the meaning of representative claim 1.

Limitations under § 103

At the outset, we only consider Appellant's arguments to the extent that such arguments are directed to specific claim limitations. Thus, we are in accord with the Examiner that the argued "dynamic adjustment of pre-allocated resources" (App. Br. 33) is not commensurate with the broader scope of representative claim 1. (Ans. 10). We find nothing in the language of claim 1 that requires the claimed resource allocation to be set up by the "network setup section" based on: (1) an aggregate of calls, and (2), resource allocation information, where such calls and resource allocation information must be considered dynamically, i.e., in real time. In this regard, we note that patentability is based upon the claims. "It is the claims that measure the invention." *SRI Int'l v. Matsushita Elec. Corp. of America*, 775 F.2d 1107, 1121 (Fed. Cir. 1985) (*en banc*). A basic canon of claim construction is that one may not read a limitation into a claim from the written description. *Renishaw plc v. Marposs Societa' per Azioni*, 158 F.3d 1243, 1248 (Fed. Cir. 1998).

Moreover, we agree with the Examiner that Appellant (App. Br. 30-34) is attacking the references in isolation. (*See* Ans. 9). As stated by the Examiner (Ans. 8, 11), the obviousness rejection of claims 1-72 is based on

the combination of references, i.e., the collective teachings of the prior art when considered from the perspective of an artisan possessing common sense and creativity at the time of Appellant's invention.³ As stated in the Answer, the Examiner looks to Feinberg for teaching or suggesting monitoring the network state, including failures such as those caused by packet loss. (Ans. 9; *see also* Feinberg's teaching of monitored Quality of Service (QoS) parameters including packet loss, col. 4, l. 26). Moreover, we find that monitoring for network failures is implicit and thus suggested by any monitoring for Quality of Service, such as the QoS network monitoring taught by Feinberg. (*Id.*).

Appellant avers that the combination of references would not have taught or suggested setting up resource allocation based on both an aggregate of call and resource allocation information, as required by the language of representative claim 1. (App. Br. 32, Reply Br. 3). In the Reply Brief, Appellant grounds this argument on the contention that "any change in allocation or setup in Hultgren is completely a function of an individual call quality" (Reply Br. 3, ¶ 1).

³ One cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. *In re Merck & Co., Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). Courts should "take account of the inferences and creative steps that a person of ordinary skill in the art would employ." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007). "It is common sense that familiar items may have obvious uses beyond their primary purposes, and a person of ordinary skill often will be able to fit the teachings of multiple patents together like pieces of a puzzle." *KSR*, 550 U.S. at 402.

However, we find Appellant is again attacking the references separately, as the Examiner relies on Nag for teaching or suggesting the limitations of “setting up resource allocation on the network based on an aggregate of calls and the resource allocation information.” (Representative claim 1) (Ans. 6, ¶ 1).

We are in accord with the Examiner’s legal conclusion that these limitations are rendered obvious based on the Examiner’s underlying factual finding that Nag teaches a media aggregation manager 300 having an architecture (Fig. 3) that multiplexes several application flows (e.g., VoIP calls) over a preallocated reservation protocol session, such as a preallocated RSVP (Resource Reservation Protocol). (FF 1). We particularly observe that Nag teaches “RSVP is an Internet Protocol-(IP) based protocol that allows applications running on end-stations, such as desktop computers, to communicate per-flow requirements by signaling the network.” *See* n.2 *supra*.

Appellant additionally avers that “Hultgren is directed to providing a *manual* control to the user rather than automatic network management as provided by the invention.” (Reply Br. 3, last paragraph). However, a claimed invention is not patentable if it merely automates a prior art process. Broadly providing an automatic way to replace a manual activity accomplishing the same result is not sufficient to distinguish an automated process over the prior art. *In re Venner*, 262 F.2d 91, 95 (CCPA 1958).

Regarding the Examiner’ rejection of several dependent claims, Appellant merely avers that “[n]othing is seen in any of the references which answers [the listed dependent claim limitations]” (App. Br. 33-34). However, a statement which merely points out what a claim recites will not

be considered an argument for separate patentability of the claim. *See* 37 C.F.R. § 41.37(c)(1)(vii). We also note the Examiner's detailed findings that are not rebutted with any substantive response by Appellant. (Ans. 4 *et seq.*; *see also* App. Br. 33-34).

On this record, we find no error in the Examiner's underlying factual findings and ultimate legal conclusion of obviousness regarding the specific limitations disputed by Appellant.

Combinability under § 103

We decide the question of whether the Examiner erred in combining the Hultgren, Feinberg, and Nag references under 35 U.S.C. § 103.

We find that each of the references relied on by the Examiner is directed to the same *general* field of endeavor as the invention on appeal, i.e., allocating resources to realize a desired level of Quality of Service (QoS) on a network.⁴

Moreover, the Supreme Court has determined that the conclusion of obviousness can be based on the interrelated teachings of multiple patents, the effects of demands known to the design community or present in the marketplace, and the background knowledge possessed by a person having

⁴ “Whether a reference in the prior art is analogous is a fact question.” *In re Clay*, 966 F.2d 656, 658 (Fed. Cir. 1992) (citing *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1568 n.9 (Fed. Cir. 1987)). Two criteria have evolved for answering the question: “(1) whether the art is from the same field of endeavor, regardless of the problem addressed, and (2) if the reference is not within the field of the inventor's endeavor, whether the reference still is reasonably pertinent to the particular problem with which the inventor is involved.” *Id.* at 658-59 (citing *In re Deminski*, 796 F.2d 436, 442 (Fed. Cir. 1986); *In re Wood*, 599 F.2d 1032, 1036 (CCPA 1979)).

ordinary skill in the art, and an obviousness “analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR*, 550 U.S. at 418. *See also Dystar Textilfarben GmbH & Co. Deutschland KG v. C.H. Patrick Co.*, 464 F.3d 1356, 1368 (Fed. Cir. 2006).

Here, it is our view that an artisan possessing common sense and creativity at the time of the invention would have been familiar with a variety of methods for allocating resources to realize a desired level of Quality of Service on a network, such as those methods taught or suggested by the collective teachings of Hultgren, Feinberg, and Nag. While we are fully aware that hindsight bias often plagues determinations of obviousness, *Graham v. John Deere Co.*, 383 U.S. 1, 36 (1966), we are also mindful that the Supreme Court has clearly stated that the “combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results,” *KSR* 550 U.S. at 401.

This reasoning is applicable here. Thus, we find unavailing Appellant’s contention that the Examiner has relied on impermissible hindsight reconstruction. (App. Br. 34, Reply Br. 5). Given the breadth of Appellant’s claims, we are not persuaded that combining the respective familiar elements of the cited references in the manner proffered by the Examiner was “uniquely challenging or difficult for one of ordinary skill in the art” (*see Leapfrog Enters., Inc. v. Fisher-Price, Inc.*, 485 F.3d 1157, 1162 (Fed. Cir. 2007) (citing *KSR*, 550 U.S. at 418)). Therefore, we find the Examiner’s proffered combination of familiar prior art elements according to their established functions would have conveyed a reasonable expectation of

success to a person of ordinary skill having common sense at the time of the invention. Thus, we find unpersuasive Appellant's argument that "Nag et al. also fails to lead to an expectation of success in achieving the meritorious functions and effects of the invention" (App. Br. 33, ll. 8-10).

Lastly, we note that Appellant has not rebutted the Examiner's legal conclusion of obviousness by showing that the claimed combination of familiar elements produces any new function. Appellant has not provided any factual evidence of secondary considerations, such as unexpected or unpredictable results, commercial success, or long felt but unmet need.

Therefore, we find Appellant's arguments unavailing regarding the combinability of the Hultgren, Feinberg, and Nag references for essentially the same reasons proffered by the Examiner in the Answer (5-6), and as further discussed above.

CONCLUSION

On this record, we find no error in the Examiner's underlying factual findings and ultimate legal conclusion of obviousness regarding the specific limitations disputed by Appellant, and regarding the combinability of the cited references. Therefore, we sustain the Examiner's obviousness rejection of representative claim 1 and claims 2-72 which fall therewith. *See* 37 C.F.R. § 41.37(c)(1)(vii).

DECISION

We affirm the Examiner's § 103 rejection of claims 1-72.

Appeal 2009-006066
Application 09/988,653

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

ORDER
AFFIRMED

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